

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF  
THE TRIAL COURT

JENZABAR, INC., LING CHAI, and  
ROBERT A MAGINN, JR.,

Plaintiffs,

v.

LONG BOW GROUP, INC.,

Defendant.

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) CIVIL ACTION NO. 07-2075-H  
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**DEFENDANT LONG BOW GROUP, INC.'S CONCISE STATEMENT OF  
MATERIAL FACTS THAT PLAINTIFF JENZABAR, INC. CANNOT DISPUTE**

Pursuant to Superior Court Rule 9A(b)(5), Defendant Long Bow Group, Inc. ("Long Bow") submits this concise statement of material facts that Plaintiff Jenzabar, Inc. ("Jenzabar") cannot dispute.<sup>1</sup>

**I. Long Bow Group**

1. Long Bow is a Massachusetts non-profit corporation organized in 1982 by Richard Gordon and Carma Hinton. (Gordon Aff. ¶ 1 (Exh. 1))<sup>2</sup> Long Bow creates educational films and documentary films about Chinese history and culture. (Gordon Aff. ¶ 2 (Exh. 1); Chang Aff. ¶ 2 (Exh. 2))

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<sup>1</sup> This Court previously dismissed all claims asserted against Long Bow by plaintiffs Ling Chai ("Chai") and Robert Maginn ("Maginn").

<sup>2</sup> All exhibit numbers refer to exhibits in the Joint Appendix.

2. Long Bow's most recognized work is a documentary titled *The Gate of Heavenly Peace* (the "Film"). (Gordon Aff. ¶ 3 (Exh. 1)) The Film studied the 1989 Tiananmen Square student protests. (Gordon Aff. ¶ 3 (Exh. 1)) The Film is banned in China, and the Chinese government has attempted to suppress the showing of the Film. (Gordon Aff. ¶ 3 (Exh. 1)) The Film also has been the subject of criticism from some of the leaders of the 1989 Tiananmen Square protests, including Chai. (Gordon Aff. ¶ 3 (Exh. 1))

3. The Film is available for purchase for educational use only through Long Bow's North American distributor, the Center for Asian-American Media ("CAAM"), and through international distributors. (Gordon Aff. ¶ 4 (Exh. 1)) Some museums, libraries, and schools have acquired the Film. (Gordon Aff. ¶ 4 (Exh. 1)) Other films created by Long Bow are available through CAAM and other distributors. (Gordon Aff. ¶ 4 (Exh. 1))

4. Long Bow does not sell complex enterprise software solutions or computer software of any kind. (Gordon Aff. ¶ 2 (Exh. 1); Chang Aff. ¶ 2 (Exh. 2)) Long Bow has never sold complex enterprise software solutions or computer software of any kind. (Gordon Aff. ¶ 2 (Exh. 1); Chang Aff. ¶ 2 (Exh. 2)) Long Bow has no business interests that overlap with Jenzabar. (Maginn Dep. 67 (Exh. 12))

## **II. The Web site**

5. Long Bow operates three web sites: [www.tsquare.tv](http://www.tsquare.tv); [www.morningsun.org](http://www.morningsun.org); [www.longbowgroup.com](http://www.longbowgroup.com). (Chang Dep. 52-53 (Exh. 15)) The web site at [www.tsquare.tv](http://www.tsquare.tv) (the "Web site") provides interested viewers with a large amount of information about the Film, the principal characters from the Film, controversy and criticism concerning the Film, the 1989 Tiananmen Square protests, and other topics related to the Film and to Chinese history and culture. (Chang Aff. ¶ 4 (Exh. 2); Gordon Aff. ¶ 5 (Exh. 1))

6. The Web site first went live in 1996. (Chang Aff. ¶ 5 (Exh. 2)) It contains over 2000 pages of text, in English and Chinese, and includes an interactive map of Tiananmen Square and a Media Library with posters, photographs, music, and over fifty video clips, among many other things. (Chang Aff. ¶ 6 (Exh. 2)) The Web site also includes information about controversy and criticism generated by the Film, including criticism from Chai herself; that criticism accuses Long Bow personnel of being “pro-Communist.” (Chang Aff. ¶ 23 (Exh. 2); Exh. 9). The Web site has been recognized by *The Washington Post*, *The Boston Globe*, *Wired*, *Yahoo* and *The Site* (MSNBC), among others, as one of the leading Internet resources on China. (Chang Aff. ¶ 6 (Exh. 2)) It is rated as an essential educational resource by the Internet Guide for China Studies at Heidelberg University and the Asian Studies WWW Monitor. (Chang Aff. ¶ 6 (Exh. 2))

7. The Web site is banned in China. (Chang Aff. ¶ 7 (Exh. 2); Gordon Aff. ¶ 5 (Exh. 1))

8. Chai is one of the most well-known and controversial figures from the 1989 Tiananmen Square student protests. (Gordon Aff. ¶ 6 (Exh. 1)) She also is a key figure in the Film. (Gordon Aff. ¶ 6 (Exh. 1)) As a result, the Web site includes pages that provide publicly available information about her and her computer software company, Jenzabar, which has been reported by the news media and in other publications. (Gordon Aff. ¶ 6 (Exh. 1); Chang Aff. ¶ 8 (Exh. 2))

9. A meta tag is hypertext markup language (“HTML”) code, invisible to the Internet user, that permits web designers to describe their web page. *Bihari v Gross*, 119 F. Supp.2d 309, 312 n 3 (S.D.N.Y. 2000)

10. As of May 2007, when this lawsuit was filed, the Web site included four web pages that reported information about Jenzabar and used the words “Jenzabar” or “Jenzabar.com” in keyword meta tags. (Chang Aff. ¶ 9 (Exh. 2)) These four pages are:

- [www.tsquare.tv/film/jenzabar.html](http://www.tsquare.tv/film/jenzabar.html) (the “main Jenzabar-related page” or “MJP”)
- [www.tsquare.tv/film/jenzabar\\_letters\\_2007.html](http://www.tsquare.tv/film/jenzabar_letters_2007.html)
- [www.tsquare.tv/film/harvard.html](http://www.tsquare.tv/film/harvard.html)
- [www.tsquare.tv/film/american\\_dream.html](http://www.tsquare.tv/film/american_dream.html)

Together, these four pages are referenced in this Statement as the “Jenzabar-related pages” or “JRP”)

11. All four of these web pages report information about Jenzabar. (Chang Aff. ¶ 15 (Exh. 2); Exhs. 3, 6-8) Long Bow used the words “Jenzabar” and “Jenzabar.com” as keyword meta tags in order to refer to Jenzabar and to index and describe the pages’ contents. (Chang Aff. ¶¶ 15, 25 (Exh. 2); Chang Dep. 92, 96-99 (Exh. 15))

12. None of the pages on the tsquare.tv web site that have no information about Jenzabar contains either Jenzabar or Jenzabar.com in its keyword or other meta tags. (Chang Aff. ¶ 25 (Exh. 2))

13. The MJP itself was first created on or about September 27, 2001. (Chang Aff. ¶ 16 (Exh. 2); Chang Dep. 96-97 (Exh. 15)) Since the MJP’s creation, its meta tags have included the words “Jenzabar” and “Jenzabar.com,” among other terms. (Chang Aff. ¶ 16 (Exh. 2)) Prior to the MJP’s creation, however, Long Bow operated a precursor to the MJP at the web address [www.nmis.org/gate/film/jenzabar.html](http://www.nmis.org/gate/film/jenzabar.html). (Chang Aff. ¶ 16 (Exh. 2)) That precursor also used the words “Jenzabar” and “Jenzabar.com” as keyword meta tags. (Chang Aff. ¶ 16 (Exh. 2))

14. Although the content has evolved since its creation, the MJP has always reported publicly available information about Jenzabar and Chai, much of which has come from news

articles in *The Boston Globe*, *Forbes*, *The Chronicle of Higher Education*, and other well-known, respected publications. (Chang Aff. ¶ 17 (Exh. 2); Exhs. 3, 5) In addition, much of the information on the MJP, or available through links found on the MJP, relates to news reports about lawsuits, disputes, controversies, and criticism concerning Jenzabar and its business practices. (Chang Aff. ¶ 17 (Exh. 2); Exhs. 3, 5; Answer to Int. No. 6 (Exh. 17))

15. In April 2007, after receiving a cease-and-demand letter from Jenzabar, Long Bow made several modifications to the MJP and to other pages that reported information about Jenzabar. (Chang Aff. ¶ 18 (Exh. 2); Exh. 3) Among these modifications was the addition of express disclaimers, which state: “These webpages are the sole responsibility of the Long Bow Group, and are in no way affiliated with or sponsored by Jenzabar, Inc.” (Chang Aff. ¶ 18 (Exh. 2); Exh. 3)

16. The other pages among the JRP that use “Jenzabar” or “Jenzabar.com” as meta tags, like the MJP, also report information about Jenzabar. (Chang Aff. ¶¶ 15, 19-21 (Exh. 2); Chang Exhs. 3, 6-8) The web page located at [www.tsquare.tv/film/jenzabar\\_letters\\_2007.html](http://www.tsquare.tv/film/jenzabar_letters_2007.html) contains all of the cease-and-demand correspondence between Long Bow and Jenzabar prior to this lawsuit being filed in May 2007. (Chang Aff. ¶ 19 (Exh. 2); Exh. 6) The web page at [www.tsquare.tv/film/harvard.html](http://www.tsquare.tv/film/harvard.html) contains excerpts from a July 25, 1999 *Boston Globe* article that describes a dispute between Jenzabar and Harvard Business School, which quotes a business school official describing Jenzabar’s own web site as: “a collection of half-truths that ultimately portray something false and mislead the public.” (Chang Aff. ¶ 20 (Exh. 2); Exh. 7) The web page at [www.tsquare.tv/film/american\\_dream.html](http://www.tsquare.tv/film/american_dream.html) contains quotes from and links to several news accounts of lawsuits, disputes, and controversies regarding Jenzabar’s business ethics. (Chang Aff. ¶ 21 (Exh. 2); Exh. 8)

17. Currently, the Web site also provides interested viewers with information about this lawsuit, including access to both parties' pleadings and briefing on various motions and the Court's rulings on those motions. (Chang Aff. ¶ 22 (Exh. 2)) The Web site also includes Long Bow's online "Appeal" and Jenzabar's "Response to the Appeal," which Long Bow posted to the Web site at Jenzabar's request. (Chang Aff. ¶ 22 (Exh. 2)) The Web site also includes criticism of the Film by Chai, including her accusation that one of the filmmakers is "Pro-Communist." (Chang Aff. ¶ 23 (Exh. 2); Exh. 9)

18. Long Bow did not use the words "Jenzabar" and "Jenzabar.com" as keyword meta tags to cause consumer confusion or to divert Internet traffic from Jenzabar. (Chang Aff. ¶¶ 25-26 (Exh. 2)) Long Bow did not use the words "Jenzabar" and "Jenzabar.com" as keyword meta tags to boost the presence of the MJP, or any other pages of the Web site, among search engine results for the word "jenzabar." (Chang Aff. ¶ 26 (Exh. 2)) Long Bow does not use Jenzabar's logo, lettering, color scheme, tagline, or anything other than the words that comprise the Marks "Jenzabar" and "Jenzabar.com." (Chang Aff. ¶ 27 (Exh. 2); Exh. 4) Each individual page among the JRP contains information about Jenzabar.

19. When a person uses Google to search the Internet for the term "jenzabar," Google supplies tens of thousands of options from which the user may choose. (Exh. 18) The first two options are Jenzabar's corporate web site. (Exh. 18) Several other search results on the first page of a Google search are other pages created either by Jenzabar or by Jenzabar's foundation. One result – the third on the list – is Long Bow's main Jenzabar related page. Another result – the seventh result – is a web page created by a third party that contains a strong criticism of Jenzabar's use of this litigation to oppress Long Bow's protected free speech. (Chang Aff. ¶ 30 (Exh. 2))

20. Long Bow did not know where the MJP or other pages of the Web site ranked among search engine results for the word “jenzabar,” until Jenzabar itself brought the MJP’s page rank to Long Bow’s attention in August 2006, during a call from Eric Russo to Nora Chang. (Chang Aff. ¶ 26 (Exh. 2))

21. Jenzabar does not know how Google and other search engines determine where to rank the MJP among search results for the word “jenzabar.” (Maginn Dep. 32-33; 69; 74-75 (Exh. 12)) Jenzabar does not know what impact, if any, Long Bow’s use of the Marks as meta tags has on search engine results for the word “jenzabar.” (Maginn Dep. 32-33 (Exh. 12)) Jenzabar hopes that Google will reveal its search algorithm so that the public will know for sure the role played by meta tags. (Maginn Dep. 62 (Exh. 12)) Jenzabar does not know the search algorithms used by Google and other search engines. (Maginn Dep. 74-75 (Exh. 12))

22. On a page on its web site, <http://googlewebmastercentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html>, Google has categorically stated that it has not taken keyword meta tags into account “for many years” in determining the placement of web pages in its search results. Google indicated that it sometimes takes the description meta tag into account in determining the content of a search result listing. (Chang Aff. ¶ 32 (Exh. 2); Exh. 10)

23. None of the other three pages of the JRP, apart from the MJP, appear in even the first 100 search results in a Google search for the term “Jenzabar.” (Chang Aff. ¶ 31 (Exh. 2))

### **III. Jenzabar**

24. Jenzabar is a Boston-based computer software company founded in 1998 by Chai. (Chai Dep. 66 (Exh. 13)). It has approximately 280 to 300 employees, more than 700 customers, and offices in Boston, Cincinnati, Knoxville, and Harrisonburg, Virginia. (Maginn Dep. 75

(Exh. 12); Chai Dep. 66 (Exh. 13); Exh. 30) Chai is President and Chief Operating Officer.

(Chai Dep. 10-11 (Exh. 13)) Her husband, Maginn, is Chairman and Chief Executive Officer.

(Maginn Dep. 91 (Exh. 12))

25. Jenzabar's "products and services are complex enterprise software solutions for higher educational institutions." (Answer to Int. No. 3 (Exh. 17)) Jenzabar has never sold documentary films. (Chai Dep. 112 (Exh. 13)) Jenzabar has a sales force. (Exh. 30) Jenzabar does not advertise through the Web-site. (Chang Aff. ¶ 29 (Exh. 2))

26. The trademarks "Jenzabar" and "Jenzabar.com" (the "Marks") have not achieved widespread recognition among the general consuming public of the United States. (Answer to Int. No. 5 (Exh. 17)) Jenzabar claims only that its "long involvement and active participation in the higher education software industry has resulted in widespread recognition of the Jenzabar marks in the higher education community..." (Answer to Int. No. 5 (Exh. 17))

27. Jenzabar's "customers typically engage in extensive due diligence over a period of months or years prior to making a decision to purchase or upgrade a Jenzabar system, or to switch from a Jenzabar system to a competitor's systems." (Answer to Int. No. 3 (Exh. 17))

28. Customers in the "nonprofit world of higher education," unlike some other industries, "care about who they are doing business with." (Maginn Dep. 165-66 (Exh. 12))

29. The word "jenzabar" means "the best and the brightest." (Exh. 19) The phrase "the best and the brightest" is the subject of many trademarks and uses in commerce that predate or conflict with Jenzabar's. (Exh. 23)

30. Jenzabar has never enforced the Marks against any party other than Long Bow. (Answer to Int. No. 8 (Exh. 17); Exh. 29) Jenzabar has never attempted to prevent or stop either



*Forbes* or *CNN* from using the Marks in meta tags on webpages that report information about Jenzabar. (Answer to Int. No. 8 (Exh. 17); Exhs. 25-28)

31. The federal registration for the Mark “Jenzabar.com” is cancelled. (Exh. 19) The federal registration application for the Mark “Jenzabar” was abandoned in March 2005, and then revived on the basis of Long Bow’s counsel’s statement to the USPTO, under penalties of perjury, that he did not receive an email sent by the USPTO to his correct email address. (Exhs. 21-22) Jenzabar did not register the Mark “Jenzabar” until June 27, 2006. (Exh. 20) The registration states that Jenzabar’s first use of this mark in commerce was September 1, 2001. (Exh. 20) Neither of the Marks is registered in Massachusetts. (Exh. 24)

32. Jenzabar formerly used the following meta tags on its web site, among others: NCAA, MCI, UT Austin, Arizona State, Michigan State, BC, UMass, TUFTS, BU, Texas A&M, Holy Cross, Colorado, UCSD, Penn State, Ohio State, Notre Dame, UCLA, NYU, SDSU, Cal State, University of Illinois, University of Florida (Chai Dep. 110 (Exh. 13)) Almost every one of these is identical or similar to a registered trademark belonging to the entity described. (Chang Aff. ¶ 34 (Exh. 2)) There is no evidence that Jenzabar had permission to use these trademarks in its web site’s meta tags.

33. Jenzabar believes that its use of the trademarks of others in its web site’s meta tags was legitimate, even without their permission, because each of those entities was among the customers with whom Jenzabar was doing business or hoped to do business. (Maginn Dep. 41-45 (Exh. 12))

#### **IV. Absence of Evidence of Actual Confusion or Harm**

34. Long Bow has never received any inquiries from persons interested in computer software. (Gordon Aff. ¶ 7 (Exh. 1); Chang Aff. ¶ 28 (Exh. 2))

35. Long Bow has never received any inquiries from anyone looking for Jenzabar. (Gordon Aff. ¶ 7 (Exh. 1); Chang Aff. ¶ 28 (Exh. 2))

36. Long Bow is not aware of any evidence that the Web site has caused any confusion of any kind among consumers (Gordon Aff. ¶ 7 (Exh. 1); Chang Aff. ¶ 28 (Exh. 2))

37. Jenzabar has no evidence that the Web site has caused any actual confusion among consumers. (Answer to Int. Nos. 1-3 (Exh. 17); Exh. 29) Jenzabar has no evidence that the MJP has caused actual confusion among consumers. (Answer to Int. Nos. 1-3 (Exh. 17); Exh. 29) Jenzabar has no evidence that Long Bow's use of the Marks has caused any actual confusion of any kind among consumers. (Answer to Int. Nos. 1-3 (Exh. 17); Exh. 29)

38. Jenzabar has no evidence that Long Bow's use of the Marks has caused any actual confusion among consumers as to the origin, sponsorship, or approval of Long Bow's products or services or as to whether there is any affiliation between Jenzabar and Long Bow. (Answer to Ints. Nos. 1-3 (Exh. 17); Exh. 29)

39. Jenzabar has no evidence that either the Site or the Website as a whole has caused Jenzabar to suffer economic harm. (Answer to Int. Nos. 14-16 (Exh. 17); Exh. 29) Jenzabar has no evidence that Long Bow's use of the Marks has caused Jenzabar to suffer economic harm. (Answer to Ints. No. 14-16 (Exh. 17); Exh. 29; Maginn Dep. 290-92 (Exh. 12))

40. Jenzabar has no evidence that it has lost money or property due to Long Bow's use of the Marks as meta tags. (Answer to Int. Nos. 14-16 (Exh. 17); Exh. 29)

41. Jenzabar's stated theory of confusion in this case is that the meta tags cause consumers to be exposed to the content of Long Bow's web site, which Jenzabar claims will mislead consumers into believing that Jenzabar has been involved in numerous lawsuits, disputes, and controversies about its business practices:

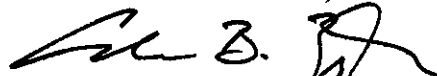
Long Bow's use of Jenzabar's marks in its metatags causes potential Jenzabar customers who are conducting due diligence on Jenzabar when deciding whether to become a Jenzabar customer to find the uncorrected false, negative information about Jenzabar contained on Long Bow's site.

(Answer to Int. No. 6 (Exh. 17); Maginn Dep. 242-243 (Exh. 12))

42. Jenzabar's stated theory of dilution by tarnishment in this case is that: "[T]he negative association that a visitor to the Long Bow site is likely to make based upon the negative, inaccurate, and misleading information set forth there is likely to damage Jenzabar's marks by tarnishment." (Answer to Int. No. 7 (Exh. 17))

Respectfully submitted,

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Dated: October 13, 2009

### CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail ~~by hand~~

Date: 10/13/09 